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Nos. 03-334, 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*, *Petitioners,*

v.

GEORGE W. BUSH, *et al.*, *Respondents.*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*, *Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Should the federal courts make themselves available to provide relief to a nonresident alien whom the Executive Branch has detained at an overseas location following its determination that: (1) the alien was captured overseas while fighting for a military force opposed to the United States; and (2) his detention is required to prevent him from returning to that military force while fighting continues?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, No. 03-1027, ___ U.S. ___ (Feb. 20, 2004); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim,* 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan educational organization

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

committed to explaining the need for a prudent national security policy for the United States, addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies.

Amici are concerned that, if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive Branch will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. *Amici* do not mean to denigrate the important liberty interests being asserted by Petitioners. Nonetheless, *amici* do not believe that the federal court system is the proper forum for reviewing those interests.

Amici are filing this brief with the consent of all parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby adopt by reference the Statement contained in the brief for Respondents.

In brief, in these consolidated cases the relatives of 16 men (two citizens of the United Kingdom, two citizens of Australia, and 12 citizens of Kuwait) are challenging their continued confinement at a United States military facility at Guantanamo Bay, Cuba. The 16 detainees were taken into custody in connection with the ongoing war against the al Qaeda terror network. The United States has determined that the 16 were fighting in Afghanistan and/or Pakistan on behalf of al Qaeda or its ally, the Taliban. The United States has further determined that although none of the Guantanamo Bay detainees is "entitled to POW privileges, they are to be

provided many of the privileges as a matter of policy" and are to be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the Third Geneva Convention of 1949." *See* Office of the White House Press Secretary, "Fact Sheet: Status of Detainees at Guantanamo," *available at* www.whitehouse.gov/news/releases/2002/02/20020207-13.html.[2] The United States made those determinations without convening a "tribunal" to review Petitioners' detention status.

In early 2002, two groups of Petitioners filed suits in U.S. District Court for the District of Columbia challenging their relatives' continued detention. One group (the "*Rasul* Petitioners") filed a petition for a writ of habeas corpus;[3] it alleges that their relatives' confinement violates the Fifth Amendment and various federal statutes. The other group (the "*Al Odah* Petitioners") claims that it is not challenging confinement but rather the denial of "fundamental rights" during the confinement. In particular, the *Al Odah* Petitioners ask that their relatives "be afforded access to an impartial tribunal to review whether any basis exists for their continued imprisonment." *Al Odah* Pet. Br. 4. Both groups deny that any of the 16 ever fought on behalf of al Qaeda or the Taliban or against the United States; they contend that the 16 were

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[2] The United States determined that the Third Geneva Convention of 1949 (governing military detention status) does not even apply to al Qaeda members because al Qaeda "is not a state party to the Geneva Convention; it is a foreign terrorist group." *Id.* It further determined that while the Taliban is covered by the Convention, "the Taliban detainees do not qualify as POWs." *Id.*

[3] The petition was initially filed on behalf of three detainees; relatives of a fourth detainee, Mamdouh Habib, joined the petition several months later.

detained while in Afghanistan or Pakistan for peaceful purposes.

On July 30, 2002, the district court dismissed both actions with prejudice. *Rasul* Petition Appendix ("Pet. App.") 32a-64a. The court held that it lacked subject matter jurisdiction over the petitions.

The court ruled that the "exclusive avenue" for the relief sought by the *Al Odah* Petitioners -- in particular, the request for "a hearing before a neutral tribunal" -- was a petition for a writ of habeas corpus and thus that both actions should be deemed habeas petitions and judged accordingly. *Id.* at 46a. The court then concluded that jurisdiction over the habeas corpus claims was precluded by *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Id.* at 48a-63a.

On March 11, 2003, a panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously affirmed. *Id.* at 1a-29a. The appeals court agreed with the district court that *Eisentrager* was controlling and required dismissal for lack of jurisdiction. The court held that nonresident aliens without "property or presence in this country" have no rights under the U.S. Constitution, and:

> The consequence of this is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not.

Id. at 12a.

The court rejected Petitioners' claims that they should be deemed to be within the United States because the U.S. military exercises "sovereign" power over Guantanamo Bay. *Id.* 14a-17a. The court also rejected Petitioners' other statutory bases for invoking jurisdiction (*e.g.*, the Alien Tort Statute, 28 U.S.C. § 1350, and the Administrative Procedure Act), finding that "'the privilege of litigation' does not extend to aliens in military custody and who have no presence in 'any territory over which the United States is sovereign.'" -- and that such aliens are barred from asserting *any* federal court claims, not simply habeas claims. Pet. App. 17a-18a.

This Court granted review on November 10, 2004, limited to the following Question: "Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."

SUMMARY OF ARGUMENT

Johnson v. Eisentrager, 339 U.S. 763 (1950), held that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. *Eisentrager* dictates that the lower courts' dismissal of this case on jurisdictional grounds be affirmed. The military inevitably will be distracted from its on-going war against al Qaeda if it is required to go into court to answer the charges of every nonresident alien who is upset over his long-term detention. There is no factual basis for asserting that the United States exercises sovereignty over Guantanamo Bay, Cuba (where Appellants are being held), and no amount of physical control over that site by the United States is sufficient to render *Eisentrager* inapplicable. Nor is it relevant that

Appellants deny that they are enemy combatants; *Eisentrager* denies access to the federal courts to *any* overseas aliens seeking release from detention, not simply those who admit to taking up arms against this country. Nor has *Eisentrager* been rendered obsolete by Senate ratification of various human rights treaties; none of those treaties grant rights enforceable by individuals in the federal courts.

Indeed, if the courts were to open their doors to Petitioners, it is unclear whether they could ever devise workable standards for reviewing claims of this nature. Military decisions are not susceptible of intelligent judicial appraisal. To avoid undue interference with military decision-making, courts likely would end up with highly deferential review standards that in most instances would rubber stamp the military's prior decision. Under those circumstances, it would be far preferable simply to maintain the current jurisdictional bar on all claims.

Finally, *amici* wish to emphasize that all press accounts suggest that the Guantanamo detainees are being well treated. Accordingly, the Court can affirm the appeals court's judgment without foreclosing entirely the possibility that some extreme forms of military misconduct might give rise to a cause of action in some later proceeding.

ARGUMENT

I. PETITIONERS' CHALLENGE TO THEIR DETENTION IS PRECLUDED BY *JOHNSON v. EISENTRAGER*, WHICH HELD THAT THE FEDERAL COURTS ARE CLOSED TO HABEAS CLAIMS FILED BY ALIENS RESIDING OUTSIDE THE COUNTRY

More than 50 years ago, the Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the federal courts are closed to the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. In the ensuing years, the Supreme Court has on numerous occasions cited *Eisentrager* with approval, and has given no indication that its continued vitality is in doubt. Petitioners' efforts to distinguish *Eisentrager* are unavailing.

At no relevant times have Petitioners had any meaningful connection with the United States. They were taken into custody in Afghanistan/Pakistan and later transferred to Cuba. None of the Petitioners makes any claim to American citizenship, to resident alien status, or to any other connection with this country. Accordingly, *Eisentrager* dictates a finding that the federal courts lack jurisdiction over Petitioners' challenge to their continued detention.

A. Petitioners' Characterization of *Eisentrager* as a Case That Did Not Limit Habeas Jurisdiction Cannot Be Squared with the Court's Principal Concern: Avoiding Proceedings That Would Hamper the Military's War Effort

Petitioners assert that *Eisentrager* cannot be accepted at face value; that despite numerous statements in the decision indicating that nonresident aliens are not entitled to seek writs of habeas corpus in American courts to challenge their overseas detention by American military authorities, the decision should be read as holding nothing more than that the petitioners in that case did not present meritorious claims. *See, e.g., Rasul* Pet. Br. 39-40; *Al Odah* Pet. Br. 29-34.

Petitioners' effort to re-write *Eisentrager* is unavailing. Most importantly, their revisionist interpretation fails to come to grips with a major policy consideration underlying the Court's decision: requiring military leaders to appear in civilian courts to explain their detention decisions -- particularly while war is ongoing -- is bound to distract them from their mandate to devote all available resources to prosecuting the war effort. Because Petitioners' briefs wholly ignored the relevant language in *Eisentrager*, *amici* quote it here at length:

> The writ, since it is held [by the German detainees] to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. *It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to*

> *submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.* Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779 (emphasis added).

Petitioners seek to use the federal courts as a forum in which to advance their claims that, despite their travel to the Afghanistan theater of war, they never took up arms against the United States. If the Court determines that the federal courthouse doors should be opened in this unprecedented manner, the military will be required to devote considerable resources to defending against Petitioners' claims, regardless what standard of review is imposed on the military's conduct and regardless whether those claims are ever demonstrated to have any merit. It was precisely to prevent the war effort from being distracted in this manner that *Eisentrager* closed the federal courts to habeas corpus claims from nonresident aliens being held overseas by the American military.

Petitioners note that the German detainees in *Eisentrager* were being held pursuant to a sentence imposed by a military tribunal following a trial at which they were permitted to raise a defense. But that distinction does not make the hampering effect of federal court intervention any less acute in this case. Moreover, that distinction is far less significant than Petitioners make it out to be. There is no contention in this case that the Executive Branch has failed to give thought to its rationale for holding Petitioners. To the contrary, the government is detaining Petitioners only after making an explicit determination that they took up arms against the

United States in support of al Qaeda or the Taliban.[4] Petitioners are unhappy with that determination. But just as *Eisentrager* declined to review the sentence imposed on the German detainees by a military tribunal (despite the detainees' assertion that the tribunal had acted improperly and had denied them their rights under the Geneva Convention of 1929), so should this Court decline to review the military's determination regarding Petitioners' culpability.

Amici note also that denial of review in this case is fully consistent with the rationale underlying the Court's historic deference to the Executive Branch in military matters and foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting views of Congressman John Marshall (10 *Annuls of Cong.* 613 (1800)). The propriety of such deference has been well recognized since our Nation's founding. As Alexander Hamilton reasoned in the Federalist Papers:

> [T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and

[4] *See* Fact Sheet, *supra* at 3. The government also determined that, under the Third Geneva Convention of 1949, Petitioners were not entitled to POW status, *id.*, and that the issue of such status apparently was sufficiently clear-cut that no tribunal needed to be convened for purposes of deciding the issue. Of course, whether Petitioners should be granted hearings regarding their POW status is not a principal focus of this suit, since gaining such status would not advance them toward their principal goal: freedom from detention.

> employing the common strength forms [a vital] and essential . . . definition of the executive authority.

The Federalist No. 74 at 447 (Clinton Rossiter, ed., 1961). *See generally*, H. Jefferson Powell, "The Founders and the President's Authority Over Foreign Affairs," 40 WM. & MARY L. REV. 1471 (1999).

Petitioners contend that the writ of habeas corpus historically has been available in situations of this sort. Tellingly, however, Petitioners have not cited even one decision in which a court reviewed the merits of a decision by its nation's military to detain, at an overseas location, a nonresident alien it deemed an enemy combatant. The absence of such case authority is hardly surprising: as *Eisentrager* noted, "the writ of *habeas corpus* is generally unknown" outside of the English-speaking world. *Eisentrager*, 339 U.S. at 779. The Court should reject Petitioner's efforts to evade *Eisentrager*'s well-reasoned rationale for limiting habeas jurisdiction.

B. *Eisentrager* Applies Without Regard to Whether Appellants Are Properly Classified as Enemy Combatants

The United States is detaining Petitioners because it has determined them to be enemy combatants captured in the Afghanistan theater. *Eisentrager* precludes judicial second-guessing of such military decisions; it held, under analogous facts, "that no right to the writ of *habeas corpus* appears." *Id.* at 781.

Petitioners nonetheless insist that *Eisentrager* is distinguishable because while they deny that they are enemy combatants, the petitioners in *Eisentrager* had been determined

by a military tribunal to be German combatants who had violated the laws of war. They insist that *Eisentrager* applies only to those aliens whose status as "enemy aliens" or "enemy combatants" is not in question.

Appellants are mistaken; *Eisentrager* is not so limited. If it were, *any* overseas alien challenging his detention by military authorities could evade *Eisentrager* entirely simply by denying that he is an enemy combatant. Indeed, even the *Eisentrager* petitioners would be granted access to the federal courts under Petitioners' interpretation of the decision, because they challenged the propriety of the military tribunals which had tried them and thus denied the validity of their convictions.

Eisentrager took as a given that the petitioners were "enemy aliens." *Eisentrager*, 339 U.S. at 777. But that statement needs to be understood in light of the Court's definition of "enemy aliens" or "alien enemies." The Court explained that "an alien enemy is the subject of a foreign state at war with the United States." *Id.* at 769 n.2. The petitioners thus qualified as alien enemies simply by virtue of their German citizenship and the fact that the state of war between Germany and the United States had not officially ended as of 1950. The Court made clear that access to the federal courts did *not* hinge on a petitioner being able to demonstrate that he was not an alien enemy. To the contrary, the Court recognized that "resident enemy alien[s]" (*i.e.*, those living in the United States) generally *are* permitted to invoke the protections of the federal courts, while "nonresident enemy alien[s]" generally are not. *Id.* at 776. Thus, it was the *Eisentrager* petitioners' nonresidency -- not their status as enemy aliens -- that was fatal to their claims. Indeed, if physical presence in the United States were not the key determinant, then *Ex parte Quirin*, 317 U.S. 1 (1942), would have been decided differently. In

Quirin, the Court exercised jurisdiction over the habeas corpus claims of German citizens being held captive in Washington, D.C., despite undisputed evidence that they not only were enemy aliens but also were enemy combatants.

The military has determined that Petitioners took up arms against our Nation; the propriety of detaining such people as enemy combatants is not lessened simply because they happen to be citizens of countries whose governments are on friendly terms with the United States. Indeed, the case for unfettered detention is far stronger in 2004 -- while the war against al Qaeda continues unabated -- than it was in 1950, when the threat from our Nazi enemies had long since faded.

C. *Eisentrager* Applies Without Regard to the Extent of the Physical Control the United States Exercises Over Guantanamo Bay

Petitioners apparently concede that the Naval Base at Guantanamo Bay is not territory over which the United States exercises ultimate sovereignty; they recognize that the area is part of Cuba. They argue nonetheless that *Eisentrager* does not preclude the exercise of federal court jurisdiction in this case because Guantanamo Bay is under effective control of the United States.

Petitioners' argument is without merit. American control of Guantanamo Bay does not serve to distinguish *Eisentrager*; were it true that federal courts have jurisdiction over habeas claims filed by any alien held in territory under effective American control, then the federal courts would be available to *all* aliens -- because by definition any alien being detained in United States custody is being held at a location that is under the effective control of the United States. Despite the *Al Odah* Petitioners' assertions to the contrary, the petitioners in

Eisentrager were being held in a military prison in post-World War II Germany that was under the effective control of the United States, but that fact did not prevent the Court from ruling that the federal courts lacked jurisdiction over their claims on grounds that the petitioners were outside territories over which the United States exercised sovereignty.[5]

Eisentrager repeatedly expressed the limits on federal court jurisdiction not in terms of "control," but in terms of whether aliens seeking access to the courts are within the territorial jurisdiction of the United States. For example, in describing the historical limits of federal court jurisdiction, the Court explained:

> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins,* the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; * * *." (Italics supplied.) 118 U.S. 356 [(1886)].

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[5] Similarly, in *Hirota v. MacArthur,* 338 U.S. 197 (1948), the petitioners (Japanese military leaders, including several facing death sentences) were being held in an Allied prison in Japan. The Court denied the habeas corpus petition on the ground that it had "no power or authority" to review the continued detention of the petitioners. *Id.* at 198. It so ruled, despite Justice Douglas's protests that the United States had effective control over the prison in which the petitioners were being held and thus that jurisdiction over the petition should have been proper under the appeals court's decision in *Eisentrager v. Forrestal,* 174 F.2d 961 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763 (1950). *Hirota*, 338 U.S. at 199-205 (Douglas, J., concurring in the judgment).

Eisentrager, 339 U.S. at 771.

Similarly, in explaining its refusal to open the federal courts to the German petitioners, the Court stated:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in this country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scene of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of the United States.

Id. at 777-78.

The Court on several occasions in recent years has cited *Eisentrager* with approval. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), the Court held that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico. In support of that holding, the Court cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269. More recently, the Court cited both *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

In sum, Petitioners' lengthy arguments regarding the extent of American control over Guantanamo Bay amount to

nothing. In the absence of evidence that Guantanamo Bay is now United States territory over which its sovereignty is recognized, *Eisentrager* cannot be distinguished based on the location of Petitioners' detention.[6]

C. Treaties Ratified by the United States Since *Eisentrager* Was Decided in 1950 Have Done Nothing to Undermine The Decision

Petitioners also suggest that *Eisentrager* has been overcome by subsequent events and may no longer govern federal court jurisdiction. *Pasul* Pet. Br. 25-26. In particular, Petitioners point to several international human rights treaties adopted in recent decades that supposedly require the United States to open its courts to habeas corpus petitions from nonresident aliens being held overseas by the U.S. military. *Id.* 23-29.

Conspicuously absent from Petitioners' argument is any assertion that any of the treaties they cite were intended by Congress to create any enforceable rights. Regardless what Petitioners' version of customary international law may have to say about Petitioners' continued detention at Guantanamo Bay, it can have absolutely nothing to say about the scope of

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[6] *Amici* urge the Court not to decide this case based on some supposed distinction between Guantanamo Bay and other overseas locations over which the United States exercises effective control. Any such distinction would not be faithful to the language of *Eisentrager*, on which the military relied in good faith in choosing Guantanamo Bay as an overseas detention site. Moreover, any such decision would not resolve the more fundamental issue before the Court regarding habeas corpus jurisdiction, because one can safely assume that, if the United States loses this case and the decision is based on a factor unique to Guantanamo Bay, it will find another overseas location in which to house nonresident alien enemy combatants captured overseas.

federal court jurisdiction, which is strictly limited by the U.S. Constitution and federal statutes. In the absence of evidence that Congress intended, through ratification of one of those treaties, to create federal court jurisdiction where none previously existed, *Eisentrager* is unaffected.

Petitioners place particular reliance on the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171. *Rasul* Pet. Br. 25-26 & n.28. Petitioners fail to note, however, as did Judge Randolph in the court below, that the ICCPR is a non-self-executing treaty; and that the U.S. Senate ratified the treaty on the basis that it created no enforceable rights in this country. Pet. App. 22a. Moreover, by its terms, the ICCPR is inapplicable to this case -- it only addresses a nation's treatment of individuals "within its territory." *See* ICCPR, Art. 2, para. 1. Moreover, Petitioners have cited no cases in which a nation's courts have applied the ICCPR or any other international human rights treaty to that nation's treatment of aliens captured overseas during military operations.

Petitioners note that the statute establishing habeas corpus jurisdiction, 28 U.S.C. § 2241, does not explicitly exclude jurisdiction over claims raised by overseas aliens. Citing the Supreme Court's rule that Congress will not be deemed to have repealed habeas jurisdiction unless it "articulate[s] specific and unambiguous statutory directives to effect a repeal," *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), Petitioners argue that Congress should not be deemed to have repealed habeas jurisdiction over claims filed by overseas aliens who are not enemy combatants. *Rasul* Pet. Br. 13-15. But this is not a case, like *St. Cyr*, in which the government contends that Congress has intended to repeal pre-existing jurisdiction. Rather, *Eisentrager* makes clear that the federal courts *have never possessed* subject matter jurisdiction over

habeas claims filed by overseas aliens. Accordingly, *St. Cyr*'s presumption against repeals of jurisdiction by implication has no bearing on this case.

II. THE COURT SHOULD NOT OPEN THE COURTHOUSE DOORS TO HABEAS PETITIONS OF THIS SORT BECAUSE THE COURTS HAVE NO ARTICULABLE STANDARDS FOR DETERMINING THE MILITARY NECESSITY OF DETENTION DECISIONS

If the Court rules that the federal courts will henceforth be open to habeas corpus petitions filed by nonresident aliens being detained overseas by the U.S. military, courts will then have to address the level of review to be imposed on detention decisions. If, for example, a petitioner challenges the U.S. military's determination that he bore arms against the United States in support of al Qaeda, a court will need to determine such issues as who bears the burden of proof, and the types and quantum of evidence that can be used to carry that burden. *Amici* respectfully submit that: (1) in order to avoid interfering with military decision-making, of necessity the courts likely would adopt an extremely deferential standard of review; and (2) there is little reason to open the courthouse door with one hand if one ends up using the other hand to create almost insurmountable roadblocks for petitioners being detained overseas.

In his dissenting opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), Justice Jackson described well the difficulty facing the judiciary when it seeks to review military decisions:

> In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Korematsu, 323 U.S. at 245 (Jackson, J., dissenting).

Many of the difficulties identified by Justice Jackson would arise in connection with any effort to assess the legality of military detention decisions. Military commanders in the field cannot afford to delay taking a potential terrorist into custody until evidence sufficient to support a criminal indictment can be compiled. Rather, on a daily basis, commanders must make numerous seat-of-the-pants decisions regarding who should be detained as potential terrorists. Surely, no one would claim that a detention decision is subject to reversal in the courts simply because, when challenged, the commander cannot point to definitive evidence of the detainees' ties with terrorists. Yet, if a detention decision is upheld in every such instance, courts risk becoming mere rubber stamps for military authorities.

Justice Jackson suggested that the preferred solution in such cases would be for the courts to decline to involve themselves in military proceedings, thereby maintaining institutional integrity and ensuring that the proceedings do not end up creating troublesome precedent:

> Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of

> Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.

Korematsu, 339 U.S. at 245-46 (Jackson, J. dissenting).

In order to avoid problems of the sort described by Justice Jackson, *amici* respectfully suggest that the Court reaffirm *Eisentrager* and hold that the federal courts are not open to habeas corpus petitions filed by nonresident aliens being detained in overseas facilities by U.S. military authorities.

III. ALL THE AVAILABLE EVIDENCE SUGGESTS THAT GUANTANAMO BAY DETAINEES ARE BEING WELL TREATED

Because the federal courts are not open to habeas corpus petitions filed by nonresident aliens, the nature of the complaints asserted by the Petitioners has no bearing on the viability of their petitions. *Amici* submit that the petitions would be subject to dismissal even if Petitioners alleged that they were being tortured by military officials.

Nonetheless, the Court need not go that far in order to affirm the judgment below. Petitioners' complaints consist almost entirely of alleged *procedural* shortcomings: *e.g.*, the military has not convened individual tribunals to determine whether any of the detainees is entitled to POW status, or whether any of them is an innocent civilian mistakenly caught up in a round-up of suspected terrorists. Under those circumstances, the Court can affirm the appeals court's judgment without foreclosing entirely the possibility that some extreme forms of military misconduct might be give rise to a cause of action in some later proceeding.

News accounts from those who have visited or been incarcerated at Guantanamo Bay attest to the generally good treatment afforded detainees. For example, a 15-year-old Afghan boy who was recently released from Guantanamo Bay stated that he had had a "good time" during his stay. *I Had a Good Time at Guantanamo, Says Inmate*, London Telegraph, February 8, 2004. A news account following his release stated:

> Mohammed Ismail Agha, 15, . . . said that he was treated very well and particularly enjoyed learning to speak English. . . . Mohammed said, "They gave me a good time in Cuba. They were very nice to me, giving me English lessons. . . . They gave me good food with fruit and water for ablutions and prayer." He said that the American soldiers taught him and his fellow child captives - aged 15 and 13 - to write and speak a little English. They supplied them with books in their native Pashto language. When the three boys left last week for Afghanistan, the soldiers looking out for them gave them a send-off dinner and urged them to continue their studies.

Id.

Petitioners argue that the principal reason that Guantanamo detainees generally have been well treated -- and that some have been released -- is the pressure they have placed on the Executive Branch by virtue of pursuing these lawsuits. That argument undervalues the importance of international political and diplomatic pressures that have been imposed on the Executive Branch to treat the detainees fairly. For example, the United Kingdom and Australia -- two close American allies in the war against al Qaeda -- have worked continuously to ensure that their citizens are treated fairly and eventually released. *See, e.g., Seven Britons in Guantanamo Could Be Freed*, London Telegraph, January 9, 2004 (reporting on negotiations between Britain and the United States, leading to preliminary agreement that seven of nine British subjects detained at Guantanamo (including Petitioner Shafiq Rasul) would be released in the near future).

Indeed, *Eisentrager* envisioned that issues regarding the treatment of military detainees would be resolved by just such non-judicial means. The Court stated that while the Executive Branch was not accountable in the *courts* for its actions with respect to nonresident alien detainees, it was nonetheless duty-bound to comply with all applicable statutes and treaties, and that compliance could be achieved without resort to the courts:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be afforded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that

> the responsibility for observance and enforcement of these rights is upon political and military authorities.

Eisentrager, 339 U.S. at 949 n.14.

In sum, the public record indicates both that Guantanamo detainees have been well treated and that significant pressure has been brought to bear on the Executive Branch to ensure that it complies fully with all applicable statutes and treaties in its treatment of the detainees. Under those circumstances, there is no justification for this Court to break with established precedent by asserting jurisdiction over Petitioners' claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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